

# One-eyed prosecution?

## On the possibility to restrict the personal jurisdiction of an international ad hoc-tribunal for ISIS-fighters

---

Rachel Behring

2020-02-04T10:09:29

The [recent calls](#) for the establishment of a new *ad hoc*-tribunal, namely to prosecute members of the terror armed group ISIS (Islamic State of Iraq and Syria), may re-spread the [debate](#) as to the [exact nature and legality](#) of international criminal courts. When the International Tribunal for the Former Yugoslavia (ICTY) was established by the UN-Security Council (UNSC or Council) in 1993, the lawfulness of this novel step was controversial. Indeed, the judicial body's [upholding of its own legality](#) was met with skepticism as it would surely have been unlikely to see the court "[signing its own death warrant](#)". Eventually, however, even initially reluctant states [accepted](#) that creating an international tribunal as a subsidiary organ of the UNSC fell within the powers of the Council under Chapter VII UN-Charter (UNCh).

The establishment of an "ISIS"-tribunal may nonetheless raise issues that have remained unanswered in the context of previous institutions of this kind. For once, questions regarding a such tribunal's *raison d'être* against the backdrop of the existent and functioning International Criminal Court (ICC) impose themselves. On a more fundamental level, an "ISIS-tribunal" might moreover be challenged for being just this: an institution created to exclusively try members of the terrorist organization and non-state armed group ISIS, [leaving aside numerous other perpetrators](#) who equally committed horrible crimes within the Syrian conflict.

While the possibility of an ISIS-tribunal has [so far](#) been discussed mostly in the alluded context of a [feared fragmentation](#) of international criminal law, the question of whether it would be possible to restrict the personal jurisdiction of an international criminal court to a defined armed group has not been at the forefront yet.

This is surprising since narrowing down the *ratione personae* of an *ad hoc*-tribunal to the members of a particular collective entity would indeed be a novelty. True, the ECCC (Extraordinary Chambers in the Courts of Cambodia), an albeit hybrid tribunal, also singled out "[the senior leaders of the Democratic Kampuchea](#)" when defining its jurisdictional scope. "[T]hose most responsible" for the crimes being prosecuted, were nonetheless equally included, effectively defining the Chambers' jurisdiction territorially. With the jurisdictions of the ICTY and its Rwandan counterpart likewise defined in territorial and temporal terms, one might consider an ISIS-tribunal an apparent step backwards. After all, the mentioned *ad hoc*-tribunals were celebrated as landmarks in the development of international criminal law precisely because all parties to the respective conflicts were subject to prosecution.

## A fight against impunity

For an ISIS-tribunal, in contrast, its jurisdictional selectivity was [what first floated the idea](#) of even creating it – for the mere reason that the prosecution of the group before the ICC [remains out of sight](#). As the senior members of the terror organization and large numbers of its fighters are citizens of Iraq and Syria – two countries that are not parties to the Rome Statute (RS) – prosecution based on the territoriality or personality principle enshrined in art. 12.2 RS was never an option. Pointing towards the policy of the court to go up and foremost against those “*most responsible*” for international crimes, Chief Prosecutor Bensouda also [neglected](#) the possibility to sporadically try only foreign fighters carrying the nationality of a contracting state. As is well-known, the way of an UNSC-referral of the Syrian situation to the ICC just as well finds itself [blocked](#) due to geopolitical reasons. Possibly fearing the prosecution of its own soldiers, Iraq equally continuous to ignore [those calling](#) for it to, at least temporarily, accept the Court’s jurisdiction under art. 12.3 RS.

Prosecuting at least the horrible atrocities of ISIS – even if initially not the entire bulk of crimes committed by very diverse actors of the Syrian civil war – surely is a common denominator the international community could nonetheless agree upon. A selective referral of an “ISIS-situation”, however, has few chances of being handled as such by the Prosecutor as it would openly contradict well-established ICC-case law. Indeed, in accordance with the precedent of the [Uganda-LRA-situation](#), the [prevailing opinion among scholars](#), and – seemingly – at [the UNSC](#) itself, generally states that the Prosecutor will always interpret her powers as to be able to widen the scope of a referral tailored to specific actors. Only in that way, she argued in the mentioned case as well as for the so-far formulated [UNSC-referrals](#), would the notion of a referred “*situation*” be interpreted “[consistently with the principles of the Rome Statute](#)”.

It seems plausible, however, that in establishing an entirely new *ad hoc*-tribunal, the UNSC would be free to design the latter as it pleases. Having called ISIS a “[global and unprecedented threat to international peace and security](#)” in the past, the Council could build upon this observation. Under art. 41 UNCh, it could once more create a criminal tribunal as a measure not involving the use of armed force. Despite the equally available option of an ICC-referral, it cannot be assumed that the UNSC would be bound to exclusively resort to this option.

## Prosecution – but not for everyone

Restricting the personal jurisdiction of an *ad hoc* international criminal tribunal would surely be unprecedented. However, would such a decision by the UNSC breach any obligations imposed upon it? Art. 24.2 UNCh compels the Council to discharge its duties in accordance with the purposes and principles of the United Nations. Art. 1.1 UNCh, in turn, clarifies that the latter includes fulfilling its functions “*in conformity with the principles of justice and international law*”. Unsurprisingly, the decisive question appears to be whether there are in fact principles or rules of international law that would prohibit the establishment of an international tribunal for the members of a defined collective entity.

Certainly, this possibility would dodge the approach developed in the jurisprudence of the ICC for the sake of ensuring accountability for crimes of merely one group of perpetrators among many. There seem to be no arguments that would support that the UNSC, endowed with wide discretionary powers regarding art. 41 UNCh, would be bound by the Rome Statute, least by the understanding of the notion of a “*situation*” developed by the ICC. In the words of the ICTY, [“in international law, every tribunal is a self-contained system”](#). Despite emerging instances of cross-fertilization and techniques of referencing to the judgement of other international courts, this admittedly radical finding of the tribunal in *Tadić* is correct at least to the extent, that there simply is no higher court of appeal or last instance that would be able to revise or harmonize the decisions of international tribunals. Equally, international law still lacks a formal *stare decisis*-rule. An approach that was developed by the Prosecutor, not even the judgeship of the ICC, and that is based explicitly on the Rome Statute, can therefore barely be considered to directly bind the UNSC when establishing a new tribunal.

Consequently, an international principle prohibiting the establishment of a criminal tribunal customized to prosecute the members of a specific armed group does not appear to exist.

Admittedly, on a political level, an ISIS-tribunal would be highly vulnerable to objections of one-sidedness. The legacy of the Nuremberg and Tokyo Tribunals has been questioned due to, surely at least partially justified, allegations of victors’ justice. Back then, the personal jurisdictions of the respective tribunals were restricted to major war criminals of [“the European axis”](#) and the [“Far East”](#). When it comes to the named accusations, however, the ICTY and ICTR might not be such a different kettle of fish. It is correct that, in those cases, justice was imposed on all sides to the conflict. A gentle reminder that the institution doing so originated from the cementation of the post-war geopolitical order nonetheless seems appropriate. The *ad hoc*-tribunals were not installed by an impartial and independent judicial or legislative body. Their creation was the result of the mere non-involvement of the P5 in the addressed conflicts.

The same goes for the referral-mechanism of the UNSC to the ICC. Celebrated as a possibility to circumvent the necessity for the Court to bind countries to its Statute through ratification, art. 13 lett. b RS can equally be read [as carrying the influence of the major powers into the justice mechanism](#). An ICC-referral depends just as much on the will of the UNSC as the establishment of an *ad hoc*-tribunal does, raising the question why the latter should be perceived as less legitimate.

### **The upsides to a novel approach**

A reflection on the laid-out idea would moreover be incomplete without pointing towards its advantages. An ISIS-tribunal would be capable of striking the balance between establishing the very individual criminal responsibility of every single ISIS-member and underlining the role of the terrorist organization as a whole in providing – in a perversely systematic way – the breeding ground for unspeakable crimes. In times where [voices](#) demanding further thinking about the [possibility of collective criminal responsibility](#) of entities such as multinational companies, but also terrorist

organizations and non-state armed groups, [are becoming louder in the literature](#), the idea to establish an ISIS-tribunal should be taken seriously. While it should not be the primary goal of the described court to hold ISIS as such responsible for its crimes, its mere creation may spark ideas as to the furtherance of this concept under international law. Also, in the light of the ever more numerous cases brought against ISIS-fighters [in domestic courts](#), which directly or indirectly apply international law standards, such development may also establish or re-enforce a fruitful “division of labor” between the national and international level. The ICC, on the other hand, cannot be expected to contribute to the process of transferring such concepts to the international scale: The drafters of the RS rejected even notions such as the mode of liability of Joint Criminal Enterprises, not to mention the possibility to prosecute corporations or collective actors. An ISIS-tribunal, in contrast, would underline the collective nature of international crimes. Represented via the individuals who perpetrated the atrocities in question and who are being individually charged for their conduct, ISIS as a whole would be brought to justice.

*Rachel Behring holds a Bachelor of Arts in International Relations from Technical University of Dresden. She is currently completing an internship at the Max-Planck-Institute for Comparative Public Law and International Law.*

Cite as: Rachel Behring, “One-eyed prosecution? On the possibility to restrict the personal jurisdiction of an international ad hoc-tribunal for ISIS-fighters”, *Völkerrechtsblog*, 4 February 2020.

